TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~489.~~ 457

FRANK B. MYERS, PLAINTIFF IN ERROR,

vs.

JOHN T. CROFT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED OCTOBER 10, 1870.

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1 Pleas before the Honorable James N. Love, judge of the United States district court for the district of Iowa, and acting judge of the United States district court for the district of Nebraska, sitting in the United States circuit court for the district last above named, at the May term, one thousand eight hundred and sixty-seven.

FRANK R. MYERS
vs.
JOHN T. CROFT.

Be it remembered that, on the first day of July, A. D. 1867, there was filed in the said circuit court, by and on behalf of the plaintiff above, a paper in the words and figures following, to wit:

United States circuit court district of Nebraska.

FRANK R. MYERS
vs.
JOHN T. CROFT.

Now comes the plaintiff in the above-entitled cause and moves the court to place this cause on the calender for trial.

J. M. WOOLWORTH,
Pl'ff's Att'y.

2 DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says that the above-entitled cause was pending in the district court of the Territory of Nebraska, undetermined, at the time of the admission of said State into the Union; that the plaintiff therein is a citizen of and resident in Pennsylvania, and the defendant is a citizen of and a resident in the State of Nebraska.

J. M. WOOLWORTH.

Sworn to and subscribed in my presence this 1st day of July, 1867.
E. B. CHANDLER, *Clerk.*

Upon which paper appears endorsements in words and figures following:

No. 49. U. S. cir't court. Myers vs. Croft. Motion. J. M. Woolworth, pl'f's att'y. Filed July 1st, 1867. E. B. Chandler, clerk.

And afterwards, to wit, on the 8th day of July, 1867, in the said cause was made and entered by said circuit court an order in the words and figures following, to wit:

3 FRANK R. MYERS
vs.
JOHN T. CROFT.

Ordered that the above-entitled cause be and the same is hereby removed from the district court of the State of Nebraska into the circuit court of the United States for the district of Nebraska, and that this order be entered as of the first day of July, 1867.

And afterwards, to wit, on the 3d day of July, 1867, was filed in said court a paper in words and figures following, to wit:

4 *Petition.*

In the district court, first judicial district of the Territory of Nebraska, within and for the county of Douglass.

FRANK R. MYERS, PLAINTIFF,
vs.
JOHN T. CROFT, DEFENDANT.

The said plaintiff, Frank R. Myers, complains of the said defendant, John T. Croft, and for this cause of action shows that he is seized in fee-simple of and well entitled to the immediate possession of the following described premises, situate in said Douglas County, said Territory of Nebraska, to wit: The north one-half (½) of the northeast quarter (¼) of the southwest quarter, (¼,) and the south one-half (½) of the southeast quarter (¼) of the northwest quarter (¼) of section number three, (3,) in township number fifteen (15) north, of range number thirteen (13) east of the sixth principal meridian, in said Territory; that he has a real estate interest therein, and that the said defendant witholds and keeps him from the possesion thereof.

Wherefore the said plaintiff demands judgment against the said defendant, that the said defendant do forthwith deliver up to said plaintiff the possession of said premises and every part thereof, and for the costs of this action.

FRANK R. MYERS,
By WOOLWORTH, LAKE & BROWN,
His Att'ys.

THE TERRITORY OF NEBRASKA,
County of Douglass, ss:

Charles H. Brown, being first duly sworn, deposes and says that he is one of the said pl'ff's att'ys, and that the reason the foregoing petition is not verified by said plaintiffs is that he is a non-resident of, and now absent from, this Territory; that he has read the said foregoing petition, and that the matters and things therein stated and set forth are true in substance and in fact, as he verily believes.

CHARLES H. BROWN.

Subscribed and sworn to before me this 30th day of November, 1865.
W'M KELLOGG, JR., *Clerk.*

4½ To WILLIAM KELLOGG, JR.,
Clerk of District Court, Douglas County, Nebraska:

Please issue summons on the foregoing petition, returnable according to law. Frank R. Myers is plaintiff and John T. Croft is defendant, and oblige, yours, &c.,

WOOLWORTH, LAKE & BROWN,
Att'ys for Myers.

We hereby acknowledge ourselves bound for all costs which may be adjudged against the plaintiff in the foregoing entitled action.
Omaha, N. T., Nov. 30, 1865.

CHARLES H. BROWN.
EMERSON S. SEYMOUR.

I hereby approve of the above sureties for costs.
Omaha, N. T., Nov. 30, 1865.

W'M KELLOGG, JR., *Clerk.*

Upon which said paper appears endorsements in words and figures following, to wit:

No. 49. Frank R. Myers vs. John P. Croft. Petition. Filed Nov. 30th, 1865. W'm Kellogg, jr., clerk. Filed July 3d, 1867. E. B. Chandler, clerk. Woolworth, Lake & Brown, pl'ff's att'ys.

5 And afterwards, to wit, on the 3d day of July, 1867, was filed in said court a paper in the words and figures following, to wit:

Amended answer.

In district court of Douglass County, N. T.

FRANK R. MYERS }
vs.
JOHN T. CROFT. }

And comes the said defendant, John T. Croft, and by leave of court, and for answer to the said petition of plaintiff, denies all the allegations in the said petition of plaintiff alleged, and each and every one of said allegations, and denies that said plaintiff had or now has title to or seized of the premises in said petition described. And this defendant further avers and says that one Eliza Croft, the wife of defendant, is seized in fee-simple of the lands in said petition described, and so seized of said premises, and that said defendant is in possession at this time, and was in possession thereof before this action was commenced, and since the month of April, 1857.

JOHN T. CROFT.

REDICK & BRIGGS,
POPPLETON & DANIEL GANTT,
Def't Att'ys.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

John I. Redick, being duly sworn, says he is attorney for def't in the above cause; that is now absent from this Territory; that he has read the above answer, and knows the contents thereof, and that he verily believes the facts therein stated to be true.

J. I. REDICK.

Subscribed in my presence and sworn to before me this 18th day of October, 1866.

W'M KELLOGG, JR., *Clerk.*

Upon which said paper appears the following indorsements:

No. 49. Frank R. Myers vs. John T. Croft. Answer. Filed Oct. 18th, 1866. W'm Kellogg, jr., clerk. Filed July 3d, 1867. E. B. Chandler, clerk.

And afterwards, to wit, on the 3d day of July, 1867, was filed in said court a paper in the words and figures following, to wit:

6 *Replication.*

District court, Douglas County, Nebraska Territory.

FRANK R. MYERS, PL'FF, }
vs.
JOHN T. CROFT, DEF'T. }

And now comes the said plaintiff and denies each and every allegation

in the answer of said defendant therein stated, except that he admits that the defendant was at the time of the commencement of this action and now is in possession of the said defendant. Wherefore he prays as in his said petition he has already prayed.

FRANK R. MYERS,
By WOOLWORTH, LAKE & BROWN,
Att'ys.

THE TERRITORY OF NEBRASKA,
County of Douglas, ss:

Charles H. Brown, being first duly sworn, deposes and says he is one of the attorneys for the said plaintiff, and that he knows the contents of said pleading, and verily believes the same to be true.

CHARLES H. BROWN.

Subscribed and sworn to before me this 18th day of Oct., 1866.
W. KELLOGG, JR., *Clerk.*

7 Upon which said paper appears the following indorsements, to wit:

No. 49. Frank R. Myers vs. John T. Croft. Replication. Filed Oct. 18, 1866. W'm Kellogg, jr., clerk. Filed July 3, 1867. E. B. Chandler, clerk. Woolworth, Luke & Brown, att'ys for def'ts.

And afterwards, to wit, on the 5th day of July, 1867, in the said cause, was rendered the verdict of the jury and the judgment of the court which appears of record in words and figures following, to wit:

FRANK R. MYERS
vs.
JOHN T. CROFT. } Ejectment.

Now this day this cause came to be heard, and the jury having heard the testimony adduced, the arguments of counsel, and the charge of the court, rendered the following verdict, to wit:

"We, the jury, find for the defendant.
(Signed) "JESSE LOWE, *Foreman.*"

It is therefore ordered by the court that the said John T. Croft, def't, recover of the said Frank Myers, pl'ff, his costs and charges herein expended and execution is awarded therefor.

And afterwards, to wit, on the 11th day of July, 1867, was filed in said court a paper in the words & figures following, to wit:

8 United States circuit court, district of Nebraska.

FRANK R. MYERS
vs.
JOHN T. CROFT.

Be it remembered that on the trial of this cause the plaintiff, to maintain the issues joined therein, on his part introduced and read in evidence certain letters-patent made by the United States of America, dated May 1st, 1860, conveying to William Penn Frailey certain lands of which the premises in question are a part; a copy of which letters-patent are hereto annexed, mark Exhibit A.

And thereupon, further to maintain on his part the said issues, the said

plaintiff introduced and read in evidence a certain deed made by the said William Penn Frailey and Carrie G., his wife, dated June 12, 1860, conveying the said premises to the plaintiff in this action, a copy of which deed is hereto annexed, marked Exhibit "B."

And thereupon the said defendant, to maintain the said issue on his part, introduced and read in evidence a certain deed made by said William Penn Frailey, conveying the premises to the Sulphur Springs Land Company, which deed was dated September 3d, 1857, and a copy thereof is hereto annexed, marked Exhibit C.

And thereupon the said defendant made to the court and jury an admission, which was thereupon entered on record, and was in the words and figures following, to wit: "On the trial of this cause the defendant, by his counsel, admitted, and consented, and agreed that his admission be entered of record in this cause, that on the 3d day of September, 1857, William Penn Frailey entered the premises in question in this cause at the United States Land Office, for the Omaha land district, with the register thereof, under and by virtue of an act of Congress entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4th, 1841, and that the usual letters-patent of the United States were issued on the 1st day of May, 1860, to said Frailey under his said entry of said lands.

9 And thereupon in consideration of the said admission so made by the said defendant, the said plaintiff desisted from proving the said facts.

The above is all the testimony adduced on said trial. And the said plaintiff thereupon moved the court to rule from the jury the deed so as aforesaid read in evidence by said defendant, for the reason that he had not shown that the Sulphur Springs Land Company was an organization capable of receiving the conveyance of land, and that, under the provisions of the act of Congress aforesaid, the said deed was null and void; which motion the said court overruled, and the said plaintiff then and there duly excepted.

And thereupon the said plaintiff prayed the court to charge the jury that the deed purporting to be made by William Penn Frailey to the Sulphur Springs Land Co., on the 3d day of September, 1857, and to convey the premises in question, was null and void; which request the said court refused, and thereupon directed the jury that the said deed was valid, and past the title to said premises, as it purported to do; to which refusal of the court, and to the said charge, the said *said* plaintiff then and there duly excepted, and prays the said judge to sign and seal this his bill of exceptions, which is done accordingly this 9th day of July, 1867.

J. M. LOVE, [SEAL.]
Judge D. C.

10 EXHIBIT A.

The United States of America to all to whom these presents shall come, greeting:

Whereas, in pursuance of the act of Congress approved March 3d, 1865, entitled "An act in addition to certain acts granting bounty land to certain officers and soldiers who have been engaged in the military service of the United States," there has been deposited in the General Land Office warrant No. 69628, for one hundred and sixty acres, in favor of Thomas Irwin, private U. S. Marine Corps, U. S. Navy, Florida war,

with evidence that the same has been duly located upon the east half of the northwest quarter and the east half of the southwest quarter of section three, in township fifteen north, of range thirteen east, in the district of lands subject to sale at Omaha, Nebraska, containing one hundred and fifty-seven acres and fifty-seven-hundredths of an acre, according to the official plate of the survey of the said land returned to the General Land Office by the surveyor general; the said warrant having been assigned by the said Thomas Irwin to William Penn Frailey, in whose favor said tract has been located:

Now, know ye that there is, therefore, granted by the United States unto the said William Penn Frailey, as assignee as aforesaid, and to his heirs, the tract of land above described:

To have and to hold the said tract of land, with the appurtenances thereof, unto the said William Penn Frailey, as assignee as aforesaid, and to his heirs and assigns, forever.

In testimony whereof I, James Buchanan, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the city of Washington, the first day of May, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fourth.

JAMES BUCHANAN.

By the President:

By J. A. B. LEONARD, *Sec'y.*

[L. S.] J. N. GRANGER,
Recorder of the General Land Office.

Recorded vol. 375, page 222.

11 GENERAL LAND OFFICE, *March 31st*, 1866.

I, James M. Edwards, Commissioner of the General Land Office, do hereby certify that the annexed is a true and literal exemplification from the patent records of this office.

In testimony whereof I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

J. M. EDWARDS,
Commissioner of the General Land Office.

EXHIBIT B.

12 This indenture, made this twelvth day of June, in the year of our Lord one thousand eight hundred and sixty, between William Penn Frailey and Carrie G. Fraily, his wife, of Knox County, State of Illinois, of the first part, and Frank R. Myers, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of six thousand dollars paid by the party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain and sell, convey and confirm unto the said party of the second part, his heirs and assigns, a certain tract or parcel of land situated in Douglas County, Nebraska Territory, and described as follows, viz: The east half of the northwest ¼ and the east half of the southwest ¼ of section three, (3,) township fifteen (15) north, of range thirteen (13) east, Nebraska Territory, containing one hundred and sixty acres, more or less, together with all and singular the hereditaments, rights, privileges, and appurtenances thereto belonging or in any wise appertaining:

To have and to hold the said premises, as above described, unto the said party of the second part, his heirs and assigns, forever.

And the said party of the first part, for themselves and their heirs, executors and administrators, do hereby covenant to and with the said party of the second part, his heirs, executors, administrators, and assigns, that they are well seized of the premises above conveyed as of a good and indefeasable estate in fee-simple, and have good right to sell and convey the same in manner and form aforesaid, and that the above-described premises are free from all incumbrances, and that the above-described premises in the quiet and peaceful possesion of the said party of the second part, his heirs or assigns, against the claim of all persons whomsoever, he will forever warrant and defend.

In testimony whereof the said W'm Penn Frailey and Carrie
13 G. Frailey, his wife, have hereunto set their hand and seal the day and year first above written.

W'M PENN FRAILY. [L. S.]
CARRIE G. FRAILY. [L. S.]

Signed, sealed, and delivered in presence of—
A. S. HAROVER.
MARY C. GOODWILL.

STATE OF ILLINOIS,
County of Knox, City of Galesburg, ss:

I, Thomas A. E. Holcomb, a notary public for said city, do certify that on this day personally appeared before me W'm Penn Fraily and Carrie G. Fraily, whose names appear signed to the foregoing deed of conveyance, and who are personally known to me to be the identical persons whose names are subscribed to said deed, as having executed the same, and acknowledged that they had executed the same as their voluntary act and deed for the use and purposes therein named; and the said Carrie G., wife of the said W'm Penn Frailey, having been by me made acquainted with the contents of said deed, and being by me examined seperate and apart from her husband, acknowledged that she had executed the same, and had relinquished her dower to the premises therein conveyed, voluntarily, freely, and without any compulsion of her said husband, and does not wish to retract.

Given under my hand and notarial seal this thirteenth day of June, eighteen hundred and sixty.

[L. S.] THOMAS A. E. HOLCOMB,
Notary Public.

14 STATE OF ILLINOIS, *Knox County:*

I, Milo D. Cooke, a police magistrate in & for said county, do hereby certify that on this day personally appeared before me William Penn Frailey and Carrie G. Frailey, whose names appear signed to the foregoing deed of conveyance, and who are personally known to me to be the identical persons whose names are subscribed to said deed, as having executed the same, and acknowledged that they executed the same as their voluntary act and deed for the purposes therein named; and the said Carrie G., wife of the said William Penn Frailey, having been by me made acquainted with the contents of said deed, and being by me examined seperate and apart from her said husband, acknowledged that she had executed the same, and had relinquished her dower to the premises therein conveyed voluntarily, freely, and without any compulsion from her said husband, and does not wish to retract.

Given under my hand and seal the first day of July, A. D. 1864.

[SEAL.] M. D. COOKE,
Police Magistrate.

THE STATE OF ILLINOIS, *County of Knox, ss:*

I, John Sheeter, clerk of the county court within and for said county, the same being a court of record, do hereby certify that the annexed instrument is executed and acknowledged in due form, according to the laws of the State of Illinois, to entitle it to be recorded therein; also, that M. D. Cooke, esq., before whom the same was acknowledged, was at the date thereof a police magistrate in and for said county, duly qualified and authorized to take said acknowledgment. And I further certify that I am well acquainted with the handwriting of the said M. D. Cooke, and verily believe that the signature to said certificate of acknowledgment is genuine.

In witness whereof I have hereto set my hand and the seal of said court, at Knoxville, in said county, this first day of July, A. D. 1864.

JOHN S. SHEETER, *Clerk.*

Upon which said deed appears the following endorsements, to wit:

Warrantee deed. W'm Penn Frailey to Frank R. Myers. Nebraska Territory, county of Douglass, ss: This instrument was filed for record on the first day of November, A. D. 1860, at 9 o'clock a. m., and was duly recorded in book M of deeds, page 632. Tho's Horner, recorder. Rec'd for record July 11th, 1864, at 11 o'clock a. m. Recorded in book P of deeds, page 553. Byron Reed, county clerk.

15 EXHIBIT C.

Know all men by these presents that we, William Penn Frailey and Caroline G. Frailey, his wife, of Saratoga, Douglas County, and Territory of Nebraska, in consideration of the sum of thirty-six thousand two hundred dollars, in hand paid by the Sulphur Springs Land Company, of Douglas County, Territory aforesaid, do hereby sell and convey unto the said Sulphur Spring Land Company the following described premises, to wit: The east half of the northwest, and the east half of the southwest quarter of section three, (3,) in township fifteen (15) north, of range thirteen east, of the 6 principal meridian in the Territory of Nebraska. And we do hereby covenant with the said Sulphur Spring Land Company that we are lawfully seized of said premises, that they are free from incumbrance, that we have good right and lawful authority to sell and convey the same; and we do hereby covenant to warrant and defend the said premises against the lawful claims of all persons whomsoever; and the said Caroline G. Frailey does hereby relinquish her right of dower to the premises hereinbefore conveyed.

Signed this third day of September, A. D. eighteen hundred and fifty-seven.

WILLIAM PENN FRAILEY. [L. S.]
CAROLINE G. FRAILEY. [L. S.]

In presence of—
WILLIAM E. MOORE,
C. B. MOORE,
Witnesses for W'm Penn Frailey.
T. J. HURFORD,
S. SLAUKER.
Witnesses for Caroline G. Frailey.

On this twenty-eighth day of September, A. D. 1857, before me, S. Slauker, a justice of the peace in and for said county, personally came Caroline G. Frailey, to me known to be the identical person whose

name s affixed to the above deed as grantor, and acknowledged the same to be her voluntary act and deed. And the said Caroline G. Frailey, wife of the said William Penn Frailey, being by me made acquainted with the contents of said instrument, acknowledged,
16 on an examination apart from her husband, that she executed the same and relinquished her right of dower to the real estate therein conveyed voluntarily and without compulsion or undue influence of her said husband.

S. SLAUKER,
Justice of the Peace.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

On this 3d day of Sept., A. D. 1857, before me, a notary public in and for said county, personally appeared the above-named William Penn Frailey, known by me to be the identical person whose name is affixed to the foregoing instrument as grantor, and acknowledged the same to be his voluntary act and deed.

WILLIAM E. MOORE,
Notary Public Douglass County, Nebraska.

THE STATE OF OHIO, *Stark County, ss:*

I, John Salm, clerk of the court of common pleas within and for said county, hereby certify that Samuel Slauker, esq., who genuine signature is affixed to the foregoing certificate of acknowledgment, was, at the time the same has date, an acting justice of the peace in and for said county, duly commissioned and qualified, and authorized to take the same; and that full faith and credit are due to all his official acts as such justice.

I do further certify that the within deed from William Penn Frailey and Caroline G. Frailey, his wife, to the Sulphur Spring Land Company, bearing date the third day of September, A. D. 1857, was executed by the grantors and acknowledged according to the laws of the State of Ohio.

In witness whereof I hereto set my hand and affix the seal of said court at the city of Canton this 28th day of September, A. D. 1857.

JOHN SALM, *Clerk.*

Upon which said deed appears the following endorsements, to wit:

Warrantee deed. W'm Penn Frailey and wife to Sulphur Spring Land Co. Filed for record Oct. 10, 1857, at ten o'clock a. m. Recorded in book H, page 373. Thomas Honner, recorder. Rec'd for record Sept. 7, 1857, at 9½ a. m. Recorded in book G, page 197. Tho's Honnor, C. reg'r.

No. 49. U. S. circuit court, district of Nebraska. May adj. term, 1867. Frank R. Myers vs John T. Croft. Bill of exceptions. Signed, sealed, and filed 11th July, 1867. E. B. Chandler, clerk.

17 And afterwards, to wit, on the 1st day of September, 1868, was filed in said court a paper in words and figures following, to wit:

In the United States circuit court, district of Nebraska.

FRANK R. MYERS }
vs. }
JOHN T. CROFT. }

DISTRICT OF NEBRASKA, *ss:*

J. M. Woolworth, being duly sworn, says he is, and for six years and

over last past has been, personally acquainted with the premises in dispute in the above-entitled cause, and with the value thereof, and that same are, and during said period have been, of the full value of two thousand dollars and over.

J. M. WOOLWORTH.

Subscribed and sworn to this 1st day of September, 1868, before me.

WATSON B. SMITH,
Clerk U. S. Circuit Court District of Nebraska.

Upon which said paper appears the following endorsements, to wit:

No. 49. U. S. circuit court, district of Nebraska. Frank R. Myers vs. John T. Croft. Affidavit. Filed Sept. 1, 1868. Watson B. Smith, clerk.

And afterwards, to wit, on the 1st day of September, 1868, was filed in said court a paper, in words and figures following, to wit:

18 Know all men by these presents that we, Frank R. Myers & James M. Woolworth, are held and firmly bound unto John T. Croft in the full and just sum of two hundred and fifty dollars, to be paid to the said John T. Croft, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents; sealed with our seals and dated this first day of September, in the year of our Lord one thousand eight hundred and sixty-eight.

Whereas lately at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Frank R. Myers, plaintiff herein, and John T. Croft, defendant, a judgment was rendered against the said Frank R. Myers, plaintiff, and the said Frank R. Myers having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John T. Croft, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Frank R. Myers shall prosecute his said writ of error to effect, and answer all costs if he fail to make his said plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK R. MYERS, [L. S.]
By J. M. WOOLWORTH, *his Att'y.* [L. S.]
JAMES M. WOOLWORTH. [L. S.]

Sealed and delivered in presence of—
WATSON B. SMITH.

Approved by—

WATSON B. SMITH, *Clerk.*

Upon which said paper appears the following endorsements, to wit:

No. 49. U. S. circuit court, district of Nebraska. Frank R. Myers vs. John T. Croft. Bond. Filed September 1, 1868. Watson B. Smith, clerk.

19 UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Watson B. Smith, clerk of the circuit court of the United States for the said district of Nebraska, do hereby certify that the foregoing

are true and faithful transcrips from the records of said court, and of the bond filed in this, my office, and that a copy of the writ of error herein has been lodged and remain in my office.

Witness my hand and the seal of said court, at Omaha, this 1st day of September, A. D. 1868.

[SEAL.] WATSON B. SMITH,
Clerk of the U. S. Circuit Court for the District of Nebraska.

20 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States to the judge of the circuit court of the United States for the district of Nebraska, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Frank R. Myers and John T. Croft, a manifest error hath happened to the great damage of the said Frank R. Myers, as by his complaint appears; we, being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the Supreme Court may cause further to be done therein to correct that error
21 what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the 27 day of August, in the year of our Lord one thousand eight hundred and sixty-eight.

WATSON B. SMITH,
Clerk of the U. S. Circuit Court for the District of Nebraska.

Allowed by—

ELMER S. DUNDY,
Judge United States District Court District of Nebraska.

(Indorsed:) No. 49. United States circuit court, district of Nebraska. Frank R. Myers vs. John T. Croft. Writ of error.

22 UNITED STATES OF AMERICA,
District of Nebraska, ss:

To John T. Croft, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Frank R. Myers is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 27th day of August, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.] ELMER S. DUNDY,
U. S. Judge District of Nebraska.

23 On this 31st day of August, 1868, in the year of our Lord one thousand eight hundred and sixty-eight, personally appeared Lincoln T. Farr, deputy U. S. marshal for the dist. of Neb., before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John T. Croft, def't in above suit.

LINCOLN T. FARR.

Sworn to and subscribed before me this 31st of Aug., 1868.

WATSON B. SMITH,
Clerk U. S. Circuit Court District of Nebraska.

Marshall's fees, $2 06.

(Indorsed:) No. 49. U. S. circuit court, district of Nebraska. Frank R. Myers vs. John T. Croft. Citation. Returned and filed this 31st day of July, A. D. 1868. Watson B. Smith, clerk.

24 Know all men by these presents that I, Frank R. Myers, hereby make, constitute, and appoint L. Douglas or J. M. Woolworth, either or both of them, my true and lawful attornies, for me & in my name, to execute any bond necessary to take the case of Myers against Croft, lately pending in the circuit court of the United States for the district of Nebraska, to the Supreme Court of the United States, or any bond that may be necessary in any suit hereafter commenced in said circuit court in which I may be a party within to take the case to the United States court, or for any other purpose.

Hereby ratifying whatever my said attorneys may lawfully do in the premises or may have heretofore done, for the purposes above named.

[SEAL.]
FRANK R. MYERS. [SEAL.]

[Fifty-cent internal revenue stamp, cancelled.]

STATE OF ILLINOIS,
County of Cook, City of Chicago, ss:

25 I, Francis P. Fisher, a notary public, duly commissioned and qualified, and residing in said city in said State & county, do hereby certify that on this day personally appeared before me, Frank R. Myers, & duly acknowledged the execution of the foregoing power of attorney as & for his voluntary act & deed, for the uses and purposes therein expressed; & I further certify that the person who so acknowledged said power is personally known to me to be the real person who executed the same.

In testimony whereof I have hereunto set my hand & seal notarial, at Chicago, this 10th day of November, 1869.

[L. S.] FRANCIS P. FISHER,
Notary Public.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, Watson B. Smith, clerk of the circuit court of the United States for the eighth judicial circuit and district of Nebraska, do hereby
26 certify that the foregoing is a true and faithful copy of the power of attorney made by Frank R. Myers to J. M. Woolworth and L. Douglas, in the case of Frank R. Myers vs. John T. Croft, on file in my office, as such clerk, and the whole thereof.

In witness whereof I have hereunto set my hand and the seal of said court at Omaha, this 3rd day of July, A. D. 1870.

[SEAL.] WATSON B. SMITH, *Clerk.*

27 (Indorsed:) No. 49. Frank R. Myers vs. John T. Croft. Power of attorney. Filed May 31, 1870. Watson B. Smith, clerk.

28 THE UNITED STATES OF AMERICA,
District of Nebraska, ss:

To John T. Croft, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein Frank R. Myers is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at Omaha, this second day of June, 1870.

[SEAL.] ELMER S. DUNDY,
Judge of the District Court of the United States, District of Nebraska.

29 DISTRICT OF NEBRASKA, *ss:*

On this 9th day of June, in the year of our Lord one thousand eight hundred seventy, personally appeared J. S. Hoile, U. S. marshal for the district of Nebraska, before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John T. Croft, def't in above suit, at Omaha, Douglas Co., Nebraska, June 8th, 1870.

J. S. HOILE,
U. S. Marshal.

Subscribed in my presence, and sworn to before me, this 9th day of June, A. D. 1870.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsed:) No. 49. United States circuit court, district of Nebraska. Frank R. Myers vs. John T. Croft. Citation. Filed June 8th, 1870. Watson B. Smith, clerk.

30 Know all men by these presents that we, Frank R. Myers, by L. Douglass, his attorney in fact, Leander Douglass, and Charles H. Brown, are held and firmly bound unto John T. Croft in the full and just sum of two hundred and fifty dollars, to be paid to the said John T. Croft, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this first day of June, in the year of our Lord one thousand eight hundred and seventy.

Whereas, lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Frank R. Myers, plaintiff, and John T. Croft, defendant, judgment was rendered against the said Frank R. Myers, and the said Frank R. Myers having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said John T. Croft having been issued, citing and admonishing to appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Frank R. Myers shall prosecute his said writ to effect and answer all

damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK R. MYERS,
By L. DOUGLASS, *his Att'y in fact.*
LEANDER DOUGLASS.
CHARLES H. BROWN.

Approved by—

ELMER S. DUNDY, *Judge.*

31 DISTRICT OF NEBRASKA, *ss:*

I, Watson B. Smith, clerk of the circuit court of the United States for said district of Nebraska, certify that the foregoing is a true copy of a bond filed in my office on the 2d day of June, 1870.

Witness my hand and the seal of said court at Omaha, June 11, 1870.

[SEAL.] WATSON B. SMITH, *Clerk.*

(Indorsed:) No. 49. United States circuit court, district of Nebraska. Frank R. Myers vs. John T. Croft. Bond. Filed June 2nd, 1870. Watson B. Smith, clerk.

32 UNITED STATES OF AMERICA,
District of Nebraska, ss:

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Nebraska, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Frank R. Myers, plaintiff, and John T. Croft, defendant, a manifest error hath happened, to the great damage of the said plaintiff in the said cause, as by his complaint appears; we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this second day of June, 1870.

[SEAL.] WATSON B. SMITH, *Clerk.*

Allowed by—

ELMER S. DUNDY,
Judge District Court of the United States Dist. of Nebraska.

33 (Indorsed:) No. 49. United States circuit court, district of Nebraska. Frank R. Myers vs. John T. Croft. Writ of error.

34 UNITED STATES OF AMERICA:

Supreme Court of the U. States, of the Dec'r term, A. D. 1870.

FRANK R. MYERS, PLAINTIFF IN ERROR,
v.
JOHN T. CROFT, DEF'T IN ERROR. } Assignm't of errors.

And now comes Frank R. Myers, the plaintiff in error, by William C. Goudy, his attorney, & says that in the record & proceedings aforesaid in the cause aforesaid there is manifest error in this, to wit:

1. The court erred in refusing to rule away from the consideration of the jury the deed executed by William Penn Frailey to the Sulphur Springs Land Company, bearing date Sept. third, A. D. 1857.

2. The court erred in refusing to charge the jury that the deed
35 so read in evidence by the def't, bearing date Sept. 3, 1857, & purporting to be executed by William Penn Frailey to the Sulphur Spring Land Company, was void & null.

3. The court erred in instructing the jury "that the said deed was valid & passed the title to said premises as it purported to do."

4. That the court erred in all the rulings aforesaid on the trial of said cause.

5. The judgment rendered in this cause is against the law & the evidence.

6. The court in allowing the deed so executed by said Frailey to Sulphur Spring Land Company to be read to the jury.

W. C. GOUDY,
Attorney for Pl'ff in Error.

(Indorsement on cover:) No. 489. Frank B. Myers, plaintiff in error, vs. John T. Croft. Nebraska C. C. U. S.
Filed 10th October, 1870.

SUPREME COURT OF THE UNITED STATE

DEC. TERM, 1871.

NO. 69.

FRANK B. MYERS, PLAINTIFF IN ERROR,

vs.

JOHN T. CROFT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATE
THE DISTRICT OF NEBRASKA.

Brief and Argument for Plaintiff in Error,

N. COBB and
L. DOUGLASS,
Attorneys for Plaintiff in

UNITED STATES OF AMERICA.

FRANK R. MYERS,
Plaintiff in Error.
vs.
JOHN P. CROFT,
Defendant in Error.

Supreme Court of the United States,
December Term, A. D. 1871.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

NELSON COBB and LEANDER DOUGLASS,
Attorneys for Plaintiff in Error.

PRINTED RECORD. PAGE.

2 and 3 This suit was brought in the District Court of Douglass county, Nebraska Territory, by filing petition in said court on 30th day of Nov. 1865, before the admission of Nebraska into the Union, to recover possession of the north half of the northeast quarter of the southwest quarter and the south half of the southeast quarter of the northwest quarter of section three, in Township number fifteen north, of Range number thirteen east, of the sixth principal meridian, situate in the county of Douglass, in the now State of Nebraska. On the 8th
1 day of July, A. D. 1867, this cause was removed into the Circuit Court of the United States, for the District of Nebraska.
2 The Plaintiff claimed title in fee, see petition.
3 The answer denies that the fee is in Plaintiff and sets up an out standing title in Eliza Croft, and admits possession in the Defendant.
3 The replication filed by Plaintiff, denied all the alligations in the answer, except possession.
4 By the bill of exceptions it appears that the Plaintiff offered and read in evidence, a patent from the United States to Wm. Penn Frailey, covering the land in controversy, dated
5 May 1st, 1860. Exhibit "A."
5 The Plaintiff also read in evidence, a deed from Wm. Penn Frailey and wife to Frank R. Myers, the Plaintiff in error, dated June 12th, A. D. 1860, conveying the land in dispute. Exhibit "B," page 6, of printed record.
5 Thereupon the Defendant offered and read in evidence, a deed made by Wm. Penn Frailey and wife, to the Sulphur Springs Land Co., dated Sept. 3d, A. D. 1857. Exhibit "C."
5 "It was admitted by the Defendant on the trial, "that on "the 3d day of September, 1857, Wm. Penn Frailey entered the "premises in question in this cause, at the United States Land "office, for theO maha Land District, with the register thereof, "under and by virtue of an act of Congress entitled, "An act "to appropriate the proceeds of the sales of the Public Lands, "and to grant pre-emption rights," approved September 4th, "1841, and that the usual letters patent of the United States "were issued on the first day of May 1860 to said Frai[illegible]

PRINTED RECORD. PAGE.

"under his said entry of said lands, and thereupon in consider-
"ation of the said admission so made by the said defendant,
"the said Plaintiff desisted from proving the said facts.

5 The Plaintiff prayed the Court to rule from the considera-
tion of the jury the deed to the Sulphur Spring Land Co., for
the reason there was no proof showing the Company was
authorized to take the conveyance of land, and because under
said act of Congress the deed was void. The Court overruled
the motion and Plaintiff excepted.

5 The Plaintiff thereupon prayed the Court to charge the
jury that the deed so made to Sulphur Spring Land Co., dated
Sept. 3d, 1857, was null and void, which request the Court
refused, and the Court thereupon charged the jury that the
said deed was valid and passed, the title to said premises as it
purported to do. To said refusal and charge, the Plaintiff
excepted.

Judgment was for Defendant. This is all the evidence.

The land was entered by Wm. Penn Frailey, Sept. 3d. 1857, under the act of Sept. 4th, 1841, as a Pre-emptor.

On the same day the land was entered, Wm. P. Frailey conveyed by deed to Sulphur Spring Land Co.

On the first day of May, 1860, the patent issued.

On the 12th day of June, 1860, Wm. P. Fraily conveyed the land to the Plaintiff in Error.

One of the main questions in this case involves the construction of the 12th section of the act of Congress of Sept. 4th, 1841, which provides that "all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

Does this intend to prohibit the Pre-emptor from all alienation of the property which he has acquired under the pre-emption act prior to the issuing of the patent, or does it intend simply to prevent the transfer of the right to pre-empt?

That it means the former, was by Justice Miller decided expressly to be his opinion in the case of Beers Executor vs. Killom et. al. decided in the Circuit Court of United States, in District of Nebraska. This view is the one best sustained by the Statute. That is the way it reads, and when the Statute is plain, it should be followed by the courts and not frittered away by subtle and nice refinements.

Until payment made for the land and certificate of purchase procured, the Pre-emptor has nothing which he could assign or transfer. If after certificate of purchase was obtained there was intended to be no restriction on the sale of the land by the Pre-emptor, why did the act use the words "prior to the issuing of the patent"? If it was the intention for the restriction to apply until the patent issued, then the language is easy and natural. That is what it says and nothing more. Does it mean what it does not say? Shall a forced and unnatural meaning be given to the language used?

The other view is, that the right secured is the right to pre-empt. That is to purchase the land on certain terms and conditions preferably to others, and that this right is fully secured when the purchase is made of the United States. The right thus preferably to purchase, cannot be transferred and it is this alone (it may be argued) which is prohibited. If so, why did the Statute use the words "prior to the issuing of the patent," instead of, prior to the issuing of the certificate? Did

not Congress know the difference between a certificate of purchase and a patent? They are different instruments and subserve a diferent purpose. The certificate shows that he has entered the land, and is entitled to a patent at some future time. The patent transfers the title.

According to the course of business ordinarily, patents do not issue for years after the entry is made. This case proves that fact, and it is not unreasonable to suppose Congress was apprised of that fact.

The view we take of this law best accords with the purpose and policy of the pre-emption privilege. The object of the Government, was in fact to induce settlements upon the public lands; but chiefly to confer the preferable right to purchase on those persons usualy in indigent circumstances, who actualy settled or improved them. It was not to aid the speculator in lands. Marks vs. Dickson, 20 Howard, 501, 505.

Pre-emptions for purposes of speculations will be less likely to be made, if the pre-emptor is obliged to wait until the patent issues before he can alienate.

There was a similar provision in the act of [29th May, 1830—4 St., 420, Sec. 3.] The language of the two acts is almost literally the same. By the act of January 23d, 1832, [4 St., 496,] the prohibitions as to assignment and transfers of the right of pre-emptions contained in the act of 1830, is removed, and it is provided that "all persons who have pur-"chased lands under the act of May 29th 1830, may assign and "transfer their certificates of purchase or final receipts, and "patents may issue in the name of such assignee, anythnig in "the act aforesaid to the contrary notwithstanding."

This shows that it was understood by Congress as restricting aleinations by the Pre-emptor, after payment and before patent issued.

The effect of allowing such transfers, was such that Congress in passing the carefully framed act of Sept. 4th, 1841, renewed the prohibition against transfers which was contained in the act of 1830. The Government had witnessed the practical effect of both policies, and the judgement of Congress as embodied in the latter act as to which is the better policy should be respected by the courts, and the language of the statute should be allowed its fair and natural meaning.

This point has never been directly decided by this court. It was not ruled in 12 Howard, 24 or 6 Howard, 284.

This question has frequently been before the State Courts, and they have with great uniformity held, that the pre-emptor had no transferable interest prior to the issuing of the patent. Arbour *vs.* Nettles, 12 La. An., 217; Pourner *vs.* White. 2, Id, 974; Penn *vs.* Ott. Id, 233; Stanbaugh *vs.* Wilson, 13. Id. 494; Stearns *vs.* Hay, 1 Ind., (Cart.), 247; McElyea *vs.* Hayter, 2 Port., (Ala.). 148; Cundiff *vs.* Orms, 7 Port., (Ala.), 58; Glen *vs.* Thistle, 23 Miss., (1 Cushm), 42-49; Wilkinson *vs.* Mayfield, 27 Miss., (5 Cushm), 542; McTyer *vs.* McDowell. 36 Ala., 39; Paulding *vs.* Grimsly, 10 Mo. 210.

If this is the true view of the statute, the deed from Wm. P. Frailey, the Pre-emptor, to the Sulphur Springs Land Co., was null and void, and neither by reason of the grant it purported to make or the covenants it contained, can it operate

Frailey would not inure to the benefit of the grantee named in he deed. McElyea *vs.* Hayter, 2 Port. (Ala.,) 148.

To hold otherwise would enable parties easily to evade the statute and defeat its policy and purpose—would contravene its plain language and involve the legal absurdity of making an instrument declared by the law to be null and void, operate as effectually as if it was not under the ban of the statuable prohibition.

If this view of the case is correct then the court erred in expressly charging the jury that the deed was valid and passed the title, as it purported to do on its face, and for this reason the judgment would be reversed.

Again, the deed from Wm. P. Frailey to the Sulphur Springs Land Company, dated September, 1857, was not sufficient to and did not pass any title to said land. The Sulphur Springs Land Company was in fact an incorporated company, under the territorial laws of Nebraska, but that fact does not appear in the proof. But it was incumbent on the defendant to show that it was incorporated and authorized to receive the deed, and take the land under the deed. If it was a corporation then it could not take the fee under the deed without local legislation authorizing it. Bealy *vs.* Knowler, 4 Peters, 152; Perrine *vs.* Chesapeake and Delaware Canal Company, 9 How., 172; Russell *vs.* Topping, 5 McLean, 194; Prady *vs.* Mayor of New York, 20 N. Y. R., 312; New London *vs.* Brainard, 22 Conn., 522; Straus *vs.* Eagle Insuranc Company, 5 Ohio, 59.

If it was not a corporation then the deed was void for uncertainty in the name of the grantee. For there must be a person *in esse* to take as grantee in order to make the deed good. Washburn on Real Property, 3d edition, 3d vol., 239 and 240

If it is not a corporation then it is a voluntary association of persons whose names are unknown and the persons are not designated. In order to make the deed good the subject of the grant must be pointed out. The company in a firm cannot take as is shown in the last authority cited. There is no one to take under this deed; so that in either or any view that can be taken of this deed, no title passed to the grantee, for the reasons above-named, and the court erred in refusing to exclude said deed and in his charge to the jury.

There is no view to be taken of this case that authorizes and sustains the judgment rendered herein. All of which is respectfully submitted and a reversal of the judgment prayed.

N. COBB & L. DOUGLASS,
Attorneys for Plaintiff in Error.

IN THE SUPREME COURT

OF THE

UNITED STATES.

FRANK B. MYERS,

vs.

JOHN T. CROFT.

Brief of Defendant in Error:

This is an action in ejectment brought by the plaintiff in error in the Territorial Court of Nebraska, and was there pending at the date of the admission of the State into the Union, and which cause was on the 1st day of July, 1867, removed to the United States Circuit Court, for the District of Nebraska.

Issue was joined upon the pleadings on the 5th day of said month and year; the cause was tried to a jury and a verdict had, and a judgment rendered in favor of defendant Croft.

The facts in the case are these; the land in question was "government land," subject to entry under the pre-emption law approved September 4th, 1841; and it is admitted by the defendant in error that one William Penn Fraily settled upon and improved the east half of the northwest quarter and the east half of the southwest quarter of

section No. 3, in township No. 15, north of range No. 13 east, in the district of Nebraska, said land covering the land in dispute. And that on the 3d day of September, 1857, he, said Fraily, entered the same from the United States under and by virtue of said pre-emption act of 1841; and that the patent for said tract issued to said Fraily on the 18th day of May, 1860.

The record shows that on the 3d day of September, 1857, said Fraily and his wife conveyed by deed in due form of law and for the consideration of $36,000, the land hereinbefore described, to the Sulphur Spring Land Company, which deed was duly acknowledged and recorded.

That afterwards, to-wit: on the day of June, 1860, the said Fraily and wife again conveyed said tract of land to the plaintiff in error, for the consideration, as expressed in the deed, of $6,000, and said plaintiff now claims to own said premises by virtue of said Fraily's second deed.

There are but two questions presented in this record:

1. Was or was not the deed made by said Fraily and wife of September 3, 1857, to the Sulphur Spring Land Company void?

2. Was the Sulphur Spring Land Company capable in law of receiving such conveyance and holding the title to said premises.

It is contended on the part of the plaintiff that, because the deed by Fraily and wife to the Sulphur Spring Land Company, was made before the patent issued, it was null and void; and cites the pre-emption act of 1841 to support the position. The defendant insists that the conveyance of September, 1857, was not void, and that the title passed to the grantee of Fraily and wife.

The act under which said land was entered is a special one intended to induce persons to go upon the public lands and enter the same, and, to that end, provided, "that any person who is the head of a family and a citizen of the United States, or has declared his intention to become one, and is over the age of twenty-one years, (and here I refer to the language of the act itself), and who shall settle upon and improve the same, shall have the right to enter the same at the local land office of the United States where said lands are subject to entry," and by making certain proof, as in the act provided; and then providing that all assignments or transfers of the *right thereby acquired* before the patent issues shall be null and void.

Now, what "right" is referred to by the act? Is it not the first right the pre-emptor secures when he settles upon and improves the land?—the right to pre-empt that land at Government price, although it may be worth $500 per acre and may have $10,000 worth of improvements thereon if they were his—"the right thereby secured" means the right he got by first settling upon and improving the uncultivated and unoccupied public domain, and the right to pre-empt that land could not be transferred to any one else until he *had proved his right and paid the Government for the land.* But the defendant in error contends that when the local land officer issues to the first settler and pre-emptor of the land his "patent certificate," so called, or receipt for the purchase-money, and the Government receives the same, in absence of all fraud, this is a complete bargain and sale between the Government and the pre-emptor: and thereafter the land is taxed to the individual and a revenue is derived therefrom to the United States.

Is there any difference between a transaction of this character between the Government and an individual and two persons? We think not. If I sell a lot of land to A and give him a receipt for the purchase money until I can execute the deed, he is as much the owner then as he would be after he got the deed.

II.

Courts of *dernier resort* always pay some regard to the effect of their decisions when involving large public interests.

It will be conceded by all that, ever since the passage of the pre-emption act of 1841, pre-emptors, after proving up their right and paying the government for the land and receiving their certificate, had the right to sell their land before the issuing of the patent, and in nine cases out of ten they have so sold their land, and the right was never questioned in any United States Court for more than twenty years; in the meantime, perhaps one-half of the land in the States, admitted since the act of 1841, are held and owned under a pre-emptor's title made before the issuing of the patent from the Government. If this Court should hold as contended for by the plaintiff in error, it would unsettle titles to property and completely flood our Courts with litigation.

III.

The record shows that Fraily received from the Sulphur Spring Land Co. $36,000 consideration for said lands, and we think that neither said Fraily, nor his second grantee, is in a position to say that Fraily had no title to said land September 3d, 1857, when he conveyed the same to said Company, and received its money, or that said Company was not capable of receiving his deed and holding the title thereto.

See case Sam'l W. Smith *vs.* J. F. Sheely, decided December, 1871, by this Court, opinion by Justice Davis. 12 Howard, 24; 6 Howard, 284.

REDICK & BRIGGS,
Counsel for Defendant in Error.